

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SHAWN A. MANGANO, ESQ.
Nevada Bar No. 6730
shawn@manganolaw.com
SHAWN A. MANGANO, LTD.
9960 West Cheyenne Avenue, Suite 170
Las Vegas, Nevada 89129-7701
Tel: (702) 304-0432
Fax: (702) 922-3851

Attorney for Righthaven LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RIGHTHAVEN LLC, a Nevada limited-liability company,

Plaintiff,

v.

DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company; and DAVID ALLEN, an individual,

Defendants.

DEMOCRATIC UNDERGROUND, LLC, a District of Columbia limited-liability company,

Counterclaimant,

v.

RIGHTHAVEN LLC, a Nevada limited-liability company; and STEPHENS MEDIA LLC, a Nevada limited-liability company,

Counterdefendants.

Case No.: 2:10-cv-01356-RLH-CWF

**RIGHTHAVEN LLC'S APPLICATION
TO INTERVENE AS OF RIGHT
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 24(A)(2)**

1 Righthaven LLC (“Righthaven”) hereby applies to intervene in this action as of right
2 pursuant Federal Rule of Civil Procedure 24(a)(2) (“Application”). Righthaven’s Application is
3 based on the below Memorandum of Points and Authorities, the pleadings and papers on file in this
4 action, any permitted oral argument, and any other matter upon which this Court takes notice. A
5 proposed order granting Righthaven’s Application is submitted concurrently with this filing.
6

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 Righthaven respectfully submits this Application to intervene as of right pursuant to Rule
10 24(a)(2). On June 14, 2011, this Court found that Righthaven lacked standing to bring its copyright
11 infringement claim. (Doc. # 116, the “Order”.) The Court’s decision was expressly based upon the
12 jurisdictional facts as they existed at the time the complaint was filed—namely the form of copyright
13 assignment and the Strategic Alliance Agreement (“SAA”) between Stephens Media and Righthaven
14 that was then in existence at the time the complaint was filed. (Order at 8.) Although Righthaven
15 respectfully disagrees with the Court’s decision that Righthaven lacked standing under the original
16 SAA, it accepts as the law of the case that Righthaven lacked standing under the complaint as filed.
17 Nevertheless, subsequent to the filing of Righthaven’s complaint, Righthaven and Stephens Media
18 executed the Clarification and Amendment to Strategic License Agreement (“Amendment”), which
19 eliminated Stephens Media’s rights of reversion and converted its right to use an assigned copyright
20 to a mere non-exclusive license. As explained in detail below, under the Amendment, Righthaven is
21 the assignee and sole owner of the copyrighted work at issue in this case. Thus, intervention as of
22 right is proper.

23 Intervention is particularly warranted here, as Defendant’s declaratory judgment claim
24 against Stephens Media is still pending because the Court found that Stephens Media still owned the
25 copyrighted Work under the original SAA. (See Order at 14, 16.) Yet, under the Amendment,
26 Stephens Media is now a mere non-exclusive licensee with no ownership rights in the copyright and
27 no standing to sue for infringement. Therefore, Righthaven seeks to intervene as of right in order to
28 protect its ownership interest in the copyright since it is the only party that may presently due so.

1 This case cannot be resolved without Righthaven's involvement because Righthaven is the only real
2 party-in-interest.

3 As set forth below, Righthaven satisfies the requirements for intervention under Rule 24.
4 Further, intervention will conserve judicial resources and allow for the efficient resolution of all
5 related issues in a single proceeding rather than forcing Righthaven to file a new complaint,
6 needlessly resulting in multiple litigations regarding similar issues. In addition, intervention will not
7 cause undue delay or prejudice to Democratic Underground. For these reasons, Righthaven
8 respectfully requests that its Application for leave to intervene as of right be granted.

9 **II. SUMMARY OF RELEVANT FACTS**

10 Righthaven filed its complaint for copyright infringement against the defendants on August
11 10, 2010 (Doc. # 1). Defendants answered the complaint (Doc. # 13) and defendant Democratic
12 Underground asserted a counterclaim for a declaratory judgment of non-infringement against
13 Righthaven and added Stephens Media as a counterclaim -defendant. (*Id.* at 6-24.) Subsequent to
14 the filing of Righthaven's complaint, Righthaven and Stephens Media executed the Amendment,
15 which remedied any previous defect in Stephens Media's copyright assignment to Righthaven, and
16 consequently, remedied any prior defect in Righthaven's ownership of the Work or its standing to
17 sue for infringement. (Doc. # 102, Ex. 3.)

18 On June 14, 2011, this Court issued an Order addressing several pending motions, including
19 the issue of whether Righthaven had standing. (Order.) Notwithstanding Righthaven's present
20 copyright ownership under the Amendment, the Court held that Righthaven's complaint must be
21 dismissed because standing did not exist at the inception of the lawsuit. (Order at 7-8.) The Court
22 did not determine whether Righthaven currently has standing to sue in view of the Amendment (*id.*
23 at 8 n.1) and dismissed Righthaven entirely from this action (*id.* at 16). Thus, the only pending
24 claim that remains in this case is Democratic Underground's counterclaim for a declaratory
25 judgment of non-infringement against Stephens Media.

26 **III. ARGUMENT**

27 Pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, a non-party may apply to
28 intervene in an action as of right. Fed. R. Civ. P. 24(a)(2). The Ninth Circuit applies a four-part test

1 to determine if intervention of right is warranted. The applicant must demonstrate that (1) the
2 intervention is timely; (2) the applicant has a significantly protectable interest relating to the property
3 or transaction that is the subject of the action; (3) the disposition of the action may, as a practical
4 matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may
5 not adequately represent the applicant's interest. *See Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir.
6 2006). "In evaluating whether Rule 24(a)(2)'s requirements are met, [courts] normally follow
7 practical and equitable considerations and construe the Rule broadly in favor of proposed
8 intervenors." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011).

9 **A. Righthaven's Application Is Timely.**

10 The timeliness requirement for intervention is satisfied in light of the fact that Righthaven
11 filed this Application within days after the Court's Order dismissing it from the case and in light of
12 the recently executed Amendment.

13 **B. As the Sole Owner of the Copyrighted Work, Righthaven Has a Significant
14 Protectable Interest in the Non-Infringement Declaratory Judgment Claim, and
15 Its Ability to Protect Its Interest Will Necessarily be Impaired by Disposition of
16 the Action.**

16 Because Righthaven is the sole owner of the copyright at issue in Democratic Underground's
17 non-infringement declaratory judgment claim, it has a significantly protectable interest which will
18 necessarily be impaired by the Court's decision as to infringement. Thus, Righthaven satisfies the
19 next two requirements for intervention, which entail having a significantly protectable interest which
20 may be impaired by the disposition of the action. *Prete*, 438 F.3d at 954. These two requirements
21 are interrelated given that a prospective intervenor "has a sufficient interest for intervention purposes
22 if it will suffer a practical impairment of its interests as a result of the pending litigation." *California
23 ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).

24 Because the Amendment remedied the prior defects in Righthaven's copyright ownership
25 under the SAA, Righthaven has a protectable interest in this case.

26 **1. Righthaven is the sole copyright owner and sole party with standing to
27 sue.**

27 Righthaven is the current owner of the copyrighted work and would have standing to bring
28 an action for infringement. 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right

1 under a copyright is entitled ... to institute an action for any infringement of that particular right
2”). A copyright owner need not have been the author or original owner; indeed, copyright law
3 recognizes the transferability of the rights protected by copyright. 17 U.S.C. § 101 (“A ‘transfer of
4 copyright ownership’ is an assignment, mortgage, exclusive license, or any other conveyance,
5 alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright,
6 whether or not it is limited in time or place of effect, but not including a nonexclusive license.”) It is
7 also black-letter law that a non-exclusive licensee, such as Stephens Media, lacks standing to sue for
8 infringement. *See id.*; *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 898 n. 7 (9th Cir. 2005).

9 Pursuant to the Amendment, there can be no question that Righthaven obtained “all right,
10 title and interest to said Work such that Righthaven shall be recognized as the copyright owner of the
11 Work, shall have the right to register said Work with the United States Copyright Office, and shall
12 have the right to pursue past, present and future infringements of the copyright in and to the Work.”
13 (Doc. # 102, Ex. 3.) As the owner of the copyright, Righthaven has the ability to exploit its
14 exclusive rights as it sees fit. Righthaven may reproduce the copyrighted work, create derivative
15 works, assign the copyright, grant licenses, receive royalty payments and sue for copyright
16 infringement. In short, Righthaven may utilize the entire bundle of exclusive rights that accompany
17 copyright ownership. Nothing in the parties’ agreements prevents Righthaven from doing so.
18 Righthaven granted a non-exclusive license back to Stephens Media to use the copyrighted work
19 (Doc. # 102, Ex. 3 at § 7.2), but that license does not divest Righthaven of its ownership rights. *See*
20 *Silvers*, 402 F.3d at 898 n. 7. As the copyright owner, Righthaven has a significant protectable
21 interest in this action.

22 **2. Neither the purpose of the transaction nor Stephens Media’s retention of**
23 **certain rights invalidates the assignment.**

24 Democratic Underground has previously argued that Righthaven’s assignment is merely a
25 “sham” because of Righthaven’s business purpose and the existence of two provisions in the
26 Amendment: a provision giving Stephens Media 30 days written notice prior to exploiting the
27 Infringed Work and a separate provision giving Stephens Media the option to re-purchase the
28 copyright. (Doc. # 102, Ex. 3.) Democratic Underground is wrong.

1 Parties routinely enter into complex agreements transferring intellectual property rights. It is
2 well-established that these transfers are not invalid simply because the original owner retains some
3 rights. *See, e.g., Vittoria N. Am., L.L.C. v. Euro-Asia Imports Inc.*, 278 F.3d 1076, 1082 (10th Cir.
4 2001) (holding that a “thirty-day reassignment clause does not establish that [the trademark
5 assignment] is a sham”) (citing *Premier Dental Prods. Co. v. Darby Dental Supply Co.*, 794 F.2d
6 850, 855-56 (3d Cir. 1986) (“[L]imitations in an otherwise valid assignment agreement do not
7 invalidate it”)); *Int’l Armament Corp. v. Matra Manurhin Int’l., Inc.*, 630 F. Supp. 741, 746 (E.D.
8 Va. 1986) (“Plaintiff’s ownership of the marks is subject to conditions on its license agreement with
9 Carl Walther, which make that distributorship revocable by Walther for violation of ‘essential’
10 clauses. Such limitations on an assignment do not invalidate or make it a sham, however.”)

11 Moreover, the Ninth Circuit, more than 40 years ago, rejected the argument that an
12 assignment made solely to facilitate a lawsuit is somehow improper. In *Rawlings v. Nat’l Molasses*
13 *Co.*, 394 F.2d 645, 648 (9th Cir. 1968),¹ the Ninth Circuit held:

14 Defendants make the further point that the arrangement between plaintiff and
15 [assignor] was accomplished for the sole purpose of permitting plaintiff to bring this
16 action without joining [assignor] as a party plaintiff or defendant. We assume that to
17 be true. Defendants urge that the transaction was a sham. The documents were in
18 fact executed and nothing in the record indicates that as between [assignor] and
19 plaintiff they are either void or voidable. If not, then the purpose underlying their
20 execution is of no concern to the defendants.

21 Thus, the Ninth Circuit long ago rejected the argument that the purpose behind a business transaction
22 or a business itself has any bearing on the issue of standing.

23 Further, courts in numerous patent cases have rejected the argument that an otherwise valid
24 transfer of intellectual property rights made to confer standing is somehow defective, or a sham,
25 because the motivating business purpose is litigation. For example, in a highly analogous case in the
26 patent context, the Federal Circuit held that patent assignments made for the sole purpose of bringing
27 suit are nonetheless valid. *SGS-Thomson Microelectronics, Inc. v. Int’l Rectifier Corp.*, 1994 WL
28

¹ Patent cases, such as *Rawlings*, are highly instructive here. As the Ninth Circuit held in *Silvers*, courts “should interpret the Copyright Act consistently with the requirement of the Patent Act” because of the fundamental similarity between the two types of intellectual property rights. 402 F.3d at 888; *see also Davis v. Blige*, 505 F.3d 90, 104 (2nd Cir. 2007) (“Although patent and copyright law function somewhat differently, courts considering one have historically looked to the other for guidance where precedent is lacking Licenses in patent and copyright function similarly”).

1 374529 (Fed. Cir. Jul. 14, 1994). There, the defendant urged the court to ignore the patent
2 assignment between related corporate entities because, like here, the agreement was entered for the
3 purpose of conferring standing to sue for infringement. The defendant also argued “sham” because
4 the assignment required the plaintiff to assign the patents back at the conclusion of the litigation, a
5 much greater restriction than that present in this case. *Id.* at *6. The court rejected defendant’s
6 arguments, ruling that “[t]his court and other courts have held that an assignment that explicitly
7 provides for possible transfer back to the assignor is nevertheless effective to give the assignee
8 standing.” *Id.* The court further held that:

9 the district court erred in granting summary judgment on the ground that the
10 assignments of the ... patents were shams because the sole purpose of the assignment
11 was to facilitate litigation. In so ruling, the trial court ignored the express language in
12 the assignments and in effect created a new requirement, not found in any case law,
13 that a patent assignment must have an “independent business purpose.”

14 *Id.* Thus, the Federal Circuit explicitly ruled that the motive or purpose of an assignment is
15 irrelevant to the assignee’s standing to enforce the exclusive rights conferred and that the assignor’s
16 ability to re-acquire its rights does not deprive the assignee of its right to bring suit. *Id.* at *6-7. If
17 the Court were to follow this reasoning, as *Silvers* holds it should, Righthaven is the sole current
18 owner of the copyright, and not Stephens Media.

19 In yet another case decided by the Federal Circuit, the court held that a grant of patent rights
20 was sufficient to confer standing notwithstanding the fact that the grantor retained several rights
21 relating to the patent. *See Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d
22 870 (Fed. Cir. 1991). In *Vaupel*, the grantor retained “1) a veto right on sublicensing by Vaupel; 2)
23 the right to obtain patents on the invention in other countries; 3) a reversionary right to the patent in
24 the event of bankruptcy or termination of production by Vaupel; and 4) a right to receive
25 infringement damages.” *Id.* at 875. Despite the grantor’s retention of these rights, the court held
26 that “none of these reserved rights was so substantial as to reduce the transfer to a mere license or
27 indicate an intent not to transfer all substantial rights.” *Id.* Here, as in *Vaupel*, the rights retained by
28 Stephens Media do not negate the exclusive rights conferred to Righthaven.

1 **3. Resolution of Democratic Underground’s non-infringement claim may**
2 **impair Righthaven’s interest in seeking redress for copyright**
3 **infringement.**

4 As discussed above, Righthaven is the owner of the Work and has been properly conveyed
5 the right to sue for an accrued infringement claim. Democratic Underground’s pending declaratory
6 judgment claim seeks a finding of non-infringement of the Work based on the doctrine of fair use.
7 (Doc. # 13 at 24-25.) Entry of such relief would undeniably affect Righthaven’s ability to protect its
8 interest in the Work. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (“The
9 requirement of a significantly protectable interest is generally satisfied when the interest is
10 protectable under some law, and there is a relationship between the legally protected interest and the
11 claims at issue.”); *Amgen, Inc. v. F. Hoffman-Laroche Ltd.*, 456 F. Supp .2d 267, 280 n. 11 (D.
12 Mass. 2006) (license in technology sufficient to support intervention as of right in patent
13 infringement action). And if there is a finding of no fair use, Righthaven would not be able to obtain
14 any remedy for Democratic Underground’s infringement. Either result would be inequitable.

15 Further, the “interest” element is “primarily a practical guide to disposing of lawsuits by
16 involving as many apparently concerned persons as is compatible with efficiency and due process.”
17 *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 985 (9th Cir. 2008)
18 (internal quotations omitted); *California ex rel. Lockyer*, 450 F.3d at 442 (“Having found that
19 appellants have a significant protectable interest, we have little difficulty concluding that the
20 disposition of this case may, as a practical matter, affect it.”); *Arakaki*, 324 F.3d at 1086 (“This
21 Court follows the guidance of Rule 24 advisory committee notes that state that ‘if an absentee would
22 be substantially affected in a practical sense by the determination made in an action, he should, as a
23 general rule, be entitled to intervene.’”). Thus, Righthaven’s Application should be granted because
24 allowing Righthaven to intervene makes sense as a practical matter. It would allow Righthaven to
25 bring its infringement claim in this action and avoid any duplicative litigation.

26 **C. Stephens Media May Not Adequately Represent Righthaven’s Interest.**

27 The final requirement to intervene as of right requires the applicant to demonstrate that the
28 existing parties inadequately represent its interest. *Prete*, 438 F.3d at 954; *Arakaki*, 324 F.3d at
 1083. Generally, the required showing of inadequate representation is minimal. *Sagebrush*

1 *Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). But when an applicant for intervention
2 and an existing party have the same ultimate objective, a presumption of adequacy of representation
3 arises. *Arakaki*, 324 F.3d at 1086. The presumption of adequate representation may be overcome
4 with a “compelling showing.” *Id.*

5 In considering whether an applicant meets the minimal inadequacy of representation
6 requirement under Rule 24(a)(2), courts ““consider several factors, including whether [a present
7 party] will undoubtedly make all of the intervenor’s arguments, whether [a present party] is capable
8 of and willing to make such arguments, and whether the intervenor offers a necessary element to the
9 proceedings that would be neglected.”” *Prete*, 438 F.3d at 956 (quoting *Sagebrush Rebellion, Inc.*,
10 713 F.2d at 528).

11 Here, the existing parties would not adequately represent Righthaven’s interest. Democratic
12 Underground is clearly adverse to Righthaven’s interest. *See Sagebrush Rebellion, Inc.*, 713 F.2d at
13 527. Thus, the only party that could potentially represent Righthaven’s interest is Stephens Media
14 through its defense of Democratic Underground’s declaratory judgment claim. And although
15 Stephens Media has an interest in seeing that the declaratory judgment claim is refuted, as discussed
16 above, it cannot presently sue for copyright infringement because it holds a non-exclusive license to
17 the Work. As a holder of a non-exclusive license, Stephens Media may seek dismissal of
18 Democratic Underground’s claim on standing grounds. Further, given Stephens Media’s lack of
19 standing to bring an infringement claim, it would not be able to bring a counterclaim against
20 Democratic Underground for infringement, and thus would not be able to recover damages or any
21 other remedy. Given this fact, Stephens Media may not advance the same arguments that
22 Righthaven would bring if it is allowed to intervene.

23
24
25
26
27
28

1 **IV. CONCLUSION**

2 For the foregoing reasons, Righthaven respectfully requests that the Court grant its request to
3 intervene as of right in this action pursuant to Rule 24(a)(2).

4 Dated this 23rd day of June, 2011.

5 SHAWN A. MANGANO, LTD.

6 By: /s/ Shawn A. Mangano
7 SHAWN A. MANGANO, ESQ.
8 Nevada Bar No. 6730
9 shawn@manganolaw.com
10 9960 West Cheyenne Avenue, Suite 170
11 Las Vegas, Nevada 89129-7701
12 Tel: (702) 304-0432
13 Fax: (702) 922-3851

14 *Attorney for Righthaven LLC*

15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that I on this 23rd day of
3 June, 2011, I caused the foregoing document to be served by the Court's CM/ECF system.
4

5 SHAWN A. MANGANO, LTD.

6 By: /s/ Shawn A. Mangano
7 SHAWN A. MANGANO, ESQ.
8 Nevada Bar No. 6730
9 shawn@manganolaw.com
10 9960 West Cheyenne Avenue, Suite 170
11 Las Vegas, Nevada 89129-7701
12 Tel: (702) 304-0432
13 Fax: (702) 922-3851

14 *Attorney for Righthaven LLC*
15
16
17
18
19
20
21
22
23
24
25
26
27
28